FILE COPY

No. 510

IN THE

Supreme Court of the United States

October Term 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), *et al.*,
Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Government Reports

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TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the International Longshoremen's and Warehousemen's Union (CIO), an affiliated local and unit, trade union in the Territory of Hawaii, and individual members and officers of these unions, respectfully request a rehearing of the order of this Court denying the issuance of a writ of certiorari to the Court of Appeals for the Ninth Circuit.

The order denying the writ was entered February 28, 1949. On application, petitioners' time within which to file a petition for rehearing was extended to April 15, 1949, by order of the Honorable Hugo L. Black, Associate Justice.

SUMMARY STATEMENT OF FACTS

Petitioners applied to the Supreme Court of the Territory of Hawaii for a perpetual writ of prohibition against the respondent judge and sugar company enjoining them from proceeding in an equity action in the territorial circuit court. At the time of the filing of the petition for the writ, the only proceedings pending were charges against the individual petitioners for contempt of an *ex parte* restraining order issued by the respondent judge at the request of the respondent sugar company, prohibiting peaceful picketing and assembly by petitioners. The rest of the issues in the equity action had been mooted at the time of the filing of the petition for the writ by the end of the strike.

The *ex parte* order for contempt of which petitioners were charged prohibited petitioners from

> (f) Mass picketing or other congregating in crowds on or near the premises of the Petitioner;
> And in Furtherance Hereof, You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress to the Petitioner's property, exclusive of the homes occupied by Petitioner's employees, said pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and without interfering with the Petitioner, its employees, or any other persons seeking to enter or leave the Petitioner's premises; said pickets being also enjoined from otherwise committing any of the acts hereinabove specified. . . .

QUESTION PRESENTED

Are the procedural provisions of the Norris-LaGuardia Act applicable to territorial circuit courts and the substantive rights created effective in Hawaii, and was the respondent judge without jurisdiction to issue the *ex parte* order complained of either because of the Norris-LaGuardia Act, or because the order he issued violated petitioners' rights guaranteed by the First Amendment?

GROUNDS OF PETITION FOR REHEARING

Petitioners request rehearing on the basis of a decision of this Court decided since the denial of the writ, and a decision of the court below in a case involving similar issues made since the filing of the petition herein, and upon substantial grounds not presented in the original petition. These grounds are:

I.

Since the denial of the writ, this Court on March 14, 1949 decided the case of *Stainback v. Po*.[1] Petitioners believe that the issues here involved should be reconsidered in the light of the re-evaluation of the relation of courts of the Territory to the federal judicial system and the re-appraisal of the difference in status of the Territory of Hawaii in contrast with a sovereign state contained in that opinion.

This Court said at page 7 of its opinion:

> Hawaii is still a territory but a territory in which the Constitution and laws of the United States generally are applicable. . . . Not only its federal courts but also its territorial courts are of course subject to congressional legislation. . . .

[1] Nos. 52 and 474, October Term, 1948.

And again at page 9, this Court said:

> In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory. A territory is subject to congressional regulation.

The reasons this Court found persuasive of the *exclusion* of the territorial federal court from the provisions of Section 266 of the Judicial Code offer sound basis for finding the *inclusion* of territorial courts within the scope of the Norris-LaGuardia Act.

Congress in Section 5 of the Hawaiian Organic Act (48 U.S.C. 495) provided:

> That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

There is nothing in the legislative history of the Norris-LaGuardia Act to indicate an intention to exclude the federally-created courts of Hawaii. The legislative definition of courts contained in the act encompasses the broadest scope within the power of Congress — "courts of the United States whose jurisdiction has been or may be conferred, or defined, or limited by Act of Congress." But even more important, Congress established a public policy of the United States in strong unequivocal language and directed that the act be construed to carry out that policy to protect the rights of labor.[2]

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[2] The Senate Judiciary Committee reporting the bill declared: The primary objective of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights —to protect first, the right of free association and, second, the right to advance the lawful objectives of association.

In the absence of any provision exempting federally-created territorial courts from legislation designed to remedy evils which Congress found "intolerable" and "violation of sacred rights of human liberty and freedom" the exemption found by the court below seems erroneous.

That Congress did not regard the provisions of the bill as inappropriate in the field of local law is apparent by its application of the act to all courts in the District of Columbia which has a considerably larger population and labor force than the Territory of Hawaii.

It is respectfully submitted that if the question presented is examined in the light of the *Po* case, the conclusion that the Norris-LaGuardia Act applies to territorial courts is inevitable.

II

The respondent judge was without jurisdiction to issue the *ex parte* order complained of because on its face it violates petitioners' rights of free speech and assembly guaran-

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And again in respect to the public policy:

> It is believed that the public policy of the United States thus declared is free from any possible objection if we desire to give those who labor equal opportunities in the economic world with the employers of labor.

And in respect to the legislative definitions on which the Court of Appeals wholly rested its decision:

> Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions. The main purpose of these definitions is to provide for limiting the injunctive powers of federal courts only in the special type of cases commonly called labor disputes, in which these powers have notoriously extended beyond the mere exercise of civil authority and wherein courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.
>
> (72nd Congress, 1st Session, Senate Report No. 163, To Accompany S. 935.)

teed by the First Amendment, and petitioners are entitled to a perpetual writ of prohibition against its enforcement. Thus petitioners contend they are entitled to relief even if it is held that the substantive and procedural provisions of the Norris-LaGuardia Act do not affect the jurisdiction of territorial circuit courts or affect the power of judges of such courts to issue injunctions in cases arising out of labor disputes.

Petitioners argued this contention before the Supreme Court of the Territory and the Court of Appeals, but neither court considered this contention.[3]

Petitioners contend that a circuit court judge does not have jurisdiction, in an *ex parte* hearing, to prohibit the exercise of petitioners' right of peaceful picketing and assembly guaranteed by the First Amendment. Petitioners believe that the *ex parte* order of the respondent judge on its face abridges these rights of petitioners as interpreted by this court in *Thornhill v. Alabama*, 310 U.S. 88, *Carlson v. People of California*, 310 U.S. 106, *American Federation of Labor v. Swing*, 312 U.S. 321, *Thomas v. Collins*, 323 U.S. 516, *Marsh v. Alabama*, 326 U.S. 501.[4]

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[3] Respondents deny that the issue of constitutional rights is raised by the Petition for the Writ of Prohibition, and apparently both courts below agreed with their contention. Petitioners contend that their petition raised the question of lack of jurisdiction of the respondent judge, and that if he was without jurisdiction to issue the order either by virtue of the Norris-LaGuardia Act, or because his order infringed on rights guaranteed by the First Amendment, they are entitled to relief.

[4] The ex parte order proscribing peaceful picketing and assembly was issued on October 17, 1946. The alleged contempt occurred on October 18, 1946, as the result of a parade through the streets of the company town. Even under the doctrine of *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, an *ex parte* hearing is surely an "insubstantial finding screening reality." And surely the mere invocation of the words "picketing en masse" used in the *Thornhill* case, do not justify any *ex parte* restraint that a territorial judge sees fit to impose.

Congress itself could not by law adopt a restraint of free speech and assembly as sweeping as the *ex parte* order of the respondent judge. Power delegated to territorial courts by Congress can only be exercised in a manner consistent with federal law and the Constitution.

Petitioners respectfully submit that the courts below erroneously denied them a perpetual writ of prohibition against the enforcement by summary contempt of the *ex parte* order complained of since on its face it collides with rights guaranteed by the First Amendment.

III

After the filing of the petition for certiorari herein on January 24, 1949, the Court of Appeals for the Ninth Circuit in *Alesna v. Rice* (No. 11, 872 on the docket of that court, Petition for Certiorari pending in this Court) sustained a decree of the Federal District Court dismissing a complaint for injunction filed under the civil rights act alleging on four different grounds a deprivation of federal and constitutional rights. Factually the background of this case and the *Alesna* case are almost identical. In both proceedings for contempt of an *ex parte* restraining order prohibiting peaceful picketing and assembly at the scene of a labor dispute are involved. In both cases, the issue of lack of jurisdiction of territorial circuit courts to issue *ex parte* orders under the Norris-LaGuardia Act are presented.

One of the grounds on which the Court of Appeals relied in sustaining the dismissal of the complaint in the *Alesna* case was that the petitioners there could have filed a writ of prohibition proceeding in the Supreme Court of the Territory, as in the instant case, and hence were not entitled to seek equitable aid from the Federal District Court. The Court of Appeals said:

> In addition, under the Hawaiian law exists the remedy of prohibition by the Hawaiian Supreme Court, a

> remedy parallel to injunction, against the territorial court in which the same issues may be disposed of summarily with the right of appeal here. Cf. *International Longshoremen's Union v. Wirtz*, 170 F. (2d) 183, 184 (Cir. 9), where the question was whether the Hawaiian court had its jurisdiction to issue injunctions in labor disputes limited by the Norris-LaGuardia Act. As well could be raised in a prohibition proceeding in the Hawaiian Supreme Court the contention of the absence of jurisdiction because the prosecution was for action permitted by the first amendment and a statute making it criminal is void.

As pointed out under Point II of this petition, petitioners argued both before the Supreme Court of the Territory and before the Court of Appeals that the writ of prohibition should issue—even if the courts found the Norris-LaGuardia Act inapplicable to territorial courts— because the *ex parte* order violated petitioners' rights under the First Amendment, but neither court considered this point, apparently on the ground that the issue was not raised by the petition.

But petitioners here and in the *Alesna* case, are thus placed on a procedural merry-go-round.

Together these two cases present clearly the picture of the violation by territorial circuit court judges of federal and constitutional rights of Hawaiian workers by the issuance of sweeping *ex parte* injunctions directed in effect against the general public proscribing peaceful picketing and assembly and so narrowly circumscribing those rights as to rob them of all substance. These two cases, examined together, show the necessity of this Court exercising its

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[5] See *Goto v. Lane*, 265 U.S. 393 (27 Haw. 65). This was an appeal from a denial of a writ of habeas corpus by the United States District Court for Hawaii after conviction of fifteen leaders of the Hawaiian Higher Wage Consummation Association for conspiracy after the 1920 sugar strike. This court did not consider the merits but held that the attorney for the workers had waived defects in the indictment and since he had permitted the time for writ of error to expire, petitioners were not entitled to habeas corpus as a substitute.

supervisory jurisdiction. In the almost fifty years this Court has been the Court of last resort for the Territory of Hawaii no case defining and establishing the federal and constitutional rights of Hawaii's working men have come before this court.[5]

The Supreme Court of Hawaii, the District Court of the United States for Hawaii and the Court of Appeals have in effect in this case and the *Alesna* case sanctioned the practice of territorial circuit courts on *ex parte* assertions of employers in acting as "policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers,"[6] and have in effect given territorial judges a license *in futuro* to continue to issue blanket *ex parte* injunctions.

Petitioners respectfully request this Court to grant rehearing of its denial of a petition for certiorari herein and to consolidate this case for hearing with the *Alesna* case, now pending on petition for certiorari before this court, because of the great importance to the working men of Hawaii of the issues presented by these cases.

Respectfully submitted,

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Dated: April 9, 1949.

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[6] 72nd Congress, 1st Session, Report No. 163, Report to Accompany S. 935.

CERTIFICATE OF COUNSEL

I hereby certify that the Petition for rehearing in the above entitled matter is presented in good faith and not for delay and that it is restricted to intervening circumstances of substantial effect and to substantial grounds which petitioner did not previously present.

HERBERT RESNER

April 9, 1949.